

Administrative Court of Munich on Seehofer Push Backs: No Protection of Interim Legal Protection?

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Last summer the German [Asylstreit](#) – the controversy about push backs of asylum seekers at the Austrian-Bavarian border called for by Minister of Interior Seehofer – jeopardized the stability of the federal government. Seehofer finally arranged take back agreements with a few Dublin member states. Based on the [German-Greek agreement](#), asylum seekers who had already claimed asylum in Greece are to be rejected at the Austrian-Bavarian border and returned to Greece within 48 hours. Is such a bilateral Dublin bypass lawful? In a case of precedence, the Administrative Court of Munich now issued an interim decision (M 5 E 19.50027).

The asylum seeker was picked up in a train from Austria to Germany and taken into detention. A Eurodac hit was found for Greece, and an entry refusal notification was handed out to the asylum seeker. He was informed that he was to be returned to Greece. The notification included an information on legal remedies, but not on interim legal remedies. Five days past the (fictitious non-) entry, and after a first removal attempt had failed due to the precarious state of health of the asylum seeker, he was returned to Greece via Munich airport.

Such a procedure omits, just to list a selection: Due information and hearing on the Dublin procedure, assessment of the appropriateness of the conditions in Greece for the individual in question, transfer notification in accordance with Art. 26 Dublin Regulation, including a reasonable deadline for interim legal protection, waiting for the deadline to expire before deportation ..., in short: [Explicit standards of the Dublin Regulation were clearly disregarded](#). The asylum seeker had to find legal protection against this line of action from abroad, with the support of PRO ASYL and a Greek NGO. His legal representative claimed early in November 2018, by way of interim relief, that the asylum seeker must be brought back to Germany immediately. The fifth chamber of the Administrative Court of Munich dismissed the motion. It decided that the asylum seeker must not be brought back to Germany. According to the preliminary assessment of the court, Greece was the responsible state and the asylum seeker not in a situation against Art. 4 of the Charter.

All's well, then? No. Even if there was indeed no infringement of Art. 4 of the Charter: There was an infringement of the asylum seeker's right that, *before* the removal, *a court* – if invoked, and there must be an opportunity to invoke it – decides about the lawfulness of the removal. This right follows from Art. 27 III c Dublin Regulation in conjunction with § 34a II 2 of the German Asylum Law. What is to be done if the authorities simply ignore the statutory right to remain pending a valid (interim) court decision, resp. at least pending deadline expiration?

Usually this question does not arise. Before Seehofer, German authorities used to respect the necessities of interim legal protection. Not only in Dublin cases but also with respect to asylum seekers who were to be returned to their country of origin following a rejection of their asylum claim. The case of *Sami A.*, [covered by the media in summer 2018](#), proved: One cannot count on that anymore. The authorities continued *Sami A.*'s deportation to Tunisia notwithstanding a ban of deportation issued by the Administrative Court of Gelsenkirchen. The judiciary reacted that same day: *Sami A.* was to be retrieved from Tunisia immediately.

Such a decision is based on a claim of remedial action: The unlawful deportation infringes the deported person's rights, and as long as her safety within the state of destination is not established by an (interim) court decision, she is entitled to a correction of the persistent unlawful consequences of the authorities' unlawful action. For unlawful Dublin transfers Art. 29 III of the Dublin Regulation stipulates a take back obligation. By imposing a take back obligation following an unlawful deportation the courts safeguard the person concerned, insist on the authorities' respect for the rule of law, and restore the control function of the judiciary: It is for the courts – if invoked, and there must be an opportunity to invoke it *before* removal – to (provisionally) decide whether there is a risk of serious harm.

Apparently, the courts are more touchy when, as in the case of *Sami A.*, the authorities ignore a *judicial* removal ban, and not, as in the present case, a removal ban laid down in law. The Administrative Court of Munich did not issue an immediate take back obligation. Notwithstanding the summary proceedings and the fact that an infringement of Art. 4 of the Charter was asserted – an arguable assertion in the case of an obviously vulnerable claimant and a removal to Greece – the court did not decide anything at all for six months. And it assessed, besides the speedily and clearly answerable question of the deportation's lawfulness, the situation of the asylum seeker in Greece. With the decision that his situation was not against Art. 4 of the Charter, the requirement of an (interim) judicial review was fulfilled and the claim of remedial action was settled, retrospectively.

With such a line of action the judiciary leaves asylum seekers affected by the unlawful practice under the Seehofer agreements without effective legal protection and levers out its own control function: It is at present the authorities and not the courts that decide, also in controversial cases, who deserves interim legal protection and who doesn't. At the risk that those promptly returned are plunged into a situation in which their rights are infringed in a serious and irreversible manner, and in which they might not be able to bring their case before the courts at all – not everyone receives the necessary civilian support. This is not effective legal protection. It is an attempt to evade European law at the expense of the asylum seekers' rights. The administrative courts should cut off the unlawful practice of the authorities under the Seehofer agreements by issuing immediate take back obligations.